



MEMORANDUM

TO: United States Commission on Civil Rights

FROM: Alliance Defending Freedom

RE: Briefing on Reconciling Nondiscrimination Principles with Religious Liberty

DATE: April 19, 2013

Introduction

Alliance Defending Freedom is a national legal organization that litigates cases implicating religious freedom, the sanctity of life, and marriage and the family. This memorandum is drafted in response to the briefing conducted by the U.S. Commission on Civil Rights on March 22, 2013, which examined recent legal developments concerning the intersection of civil liberties and nondiscrimination laws. Edward Whelan, President of the Ethics and Public Policy Center, provided expert testimony at the briefing, and stated that the “sweeping application of nondiscrimination principles poses an increasingly severe threat to civil liberties.” We have extensive experience defending clients whose lives have been thrown into turmoil—and whose religious liberties have been subverted—by nondiscrimination laws, and we therefore emphatically agree with Mr. Whelan’s assessment. We have prepared this submission because we are concerned that nondiscrimination laws are increasingly wielded to unjustifiably burden the freedom of religion and conscience that should rightly be enjoyed by all Americans. Before exploring the legal issues surrounding these vital matters, which are discussed below, we begin by illustrating the menace that modern nondiscrimination laws pose to freedom and liberty, through the stories of the real harms suffered by some of our clients.

Jonathan and Elaine Huguenin

In New Mexico, Elaine and Jonathan Huguenin operate a company called Elane Photography, which specializes in wedding photography. Elaine, an artist with a degree in photography, is the lead photographer for the company, and she employs a photojournalistic style in her work, using her pictures to tell stories for her clients.

In going about their work, both Elaine and Jonathan are ever-mindful about the messages communicated through the photographs Elaine creates. Company policy ensures that they will never tell a story or convey a message contrary to their belief system. As believing Christians,

Elaine and Jonathan believe the Bible's teaching that marriage is the union of one man and one woman.

In September 2006, Vanessa Willock asked Elaine to create pictures of her same-sex commitment ceremony. Elaine believed that the pictures she would create at the event would tell a story of marriage at odds with her religious convictions and what she believes to be God's plan for marriage. As a result, she politely declined.

Ms. Willock readily found another photographer eager to help her celebrate her day, and that photographer charged less money than Elaine does to tell the story of the ceremony. But, unfortunately, this was not enough for Ms. Willock. Unwilling that the Huguenins be free to conduct themselves consistently with their religious beliefs, Ms. Willock sued the company under the New Mexico Human Rights Act, alleging unlawful discrimination on the basis of sexual orientation.

The New Mexico Human Rights Commission used the Act to punish Elaine and Jonathan for declining to photograph Ms. Willock's ceremony, and ordered them to pay nearly \$7,000 in attorneys' fees to Ms. Willock's attorney. So far, the New Mexico courts have upheld that decision.

The human toll this struggle continues to take on the Huguenins is real and palpable, resulting in, among other things, hateful phone calls, personal threats against them (such as a threat to burn down their house with them and their family still in it), and years of litigation angst that (upon every thought of the case) leaves Elaine's stomach in knots. And but for the pro-bono services of Alliance Defending Freedom, a benefit not available to all business owners, the financial costs of defending themselves in court for more than six years would have been catastrophic to the Huguenins, both personally and professionally.

Unfortunately, the reviewing courts have so far been impervious to the constitutional reality that compelling Elaine and Jonathan to tell a story expressing messages that contravene their religious beliefs violates their rights under the First Amendment, not to mention their rights under the New Mexico Religious Freedom Restoration Act.

Even if Elaine and Jonathan eventually prevail in this case, it is tragic and regrettable that the imperatives of the nondiscrimination regime have forced them to spend almost a quarter of their young lives—all while trying to make a living and raise a family—to vindicate rights that were given pride of place in our nation's founding and still-governing documents.

Jim and Mary O'Reilly

In the bucolic Vermont countryside, Jim and Mary O'Reilly operate the Wildflower Inn, a family owned bed-and-breakfast. For many years operating in a State that legally recognizes same-sex unions, the O'Reillys, a committed Catholic family, had an established business practice when approached by anyone asking the inn to host an event celebrating a same-sex marriage or civil union. When presented with such a request, Jim would honestly disclose his deeply held religious conviction that marriage is the union of one man and one woman, while

nevertheless maintaining that the inn will host ceremonies or receptions for same-sex unions because that is what the State's nondiscrimination law requires. Jim would disclose this information about his religious convictions because he felt compelled to be honest with potential customers. This practice was approved by the Vermont Human Rights Commission in 2005, which concluded that there were "no reasonable grounds to believe that Wildflower illegally discriminated" merely by Jim's communicating his beliefs to a potential customer who inquired about celebrating a civil union on the property.

In 2011 the ACLU teamed up with the Human Rights Commission, the same entity that had blessed the O'Reillys' conduct just six years before, in a lawsuit against Wildflower. The lawsuit began when a former Wildflower employee falsely claimed that the inn would not allow a same-sex wedding reception. But the ACLU and the government did not merely challenge Wildflower's alleged unwillingness to host a same-sex reception; they directly attacked the O'Reillys' approved practice of honestly disclosing their religious beliefs about marriage to potential customers.

The O'Reillys' expression of their religious beliefs came at great cost. The real-world implications of a protracted legal battle with the government and the ACLU (and the prospect of paying the government's and the ACLU's attorneys' fees) threatened to bankrupt the O'Reillys and shutter the business they had worked so hard to build. Although the Commission agreed that the O'Reillys acted in good-faith reliance on its 2005 ruling, the government and the ACLU demanded that the O'Reillys pay \$10,000 to the Commission as a civil penalty and \$20,000 to a charitable trust set up by the ACLU's clients. Forced with the prospect of potentially losing their business, the O'Reillys relented and agreed to these terms in August 2012.

This case was not about access to services—the ACLU's clients were easily able to find a venue for their reception, and the Wildflower's business practice did not deny services to anyone, but merely disclosed the O'Reillys' relevant religious convictions. What the government and the ACLU really objected to was the O'Reillys' mere mention of their views about marriage—views that conflict with the prevailing political orthodoxy in Vermont. For this, the government and ACLU insisted that the O'Reillys be punished. This case demonstrates the threat that nondiscrimination laws present to religious freedom—that those who disagree with the government's views about issues implicating a statutorily protected classification must pay dearly for the exercise of their constitutional rights.

Blaine Adamson and Hands On Originals

Blaine Adamson is the managing owner of Hands On Originals, a printing company in Lexington, Kentucky that specializes in producing promotional materials. Blaine is a believing, practicing Christian who strives to live consistently with Biblical commands. He believes that God commands obedience in all areas of his life, and he does not distinguish between conduct in his personal life and his actions as a business owner. As a result, he strives to avoid using his company to design, print, or produce materials that convey messages or promote events or organizations that conflict with his sincerely held religious convictions.

In March 2012, the Gay and Lesbian Services Organization ("GLSO"), an advocacy organization that promotes same-sex relationships and homosexual conduct, asked Blaine and his

company to print promotional shirts for the Lexington Pride Festival, which, like GLSO, celebrates same-sex relationships and homosexual conduct. Blaine politely declined the request because he knew that the content of those shirts and the event that they would promote would communicate messages clearly at odds with his religious beliefs.

Blaine nevertheless did offer to connect GLSO with another company that would print the shirts for the same price that Hands On Originals would have charged. Yet this courtesy was not enough for the GLSO and its members. They believed that Blaine and his business should be punished for his objection to their messages. As a result, the GLSO filed a discrimination complaint with the Lexington-Fayette Urban County Human Rights Commission, alleging that Hands On Originals unlawfully discriminated on the basis of sexual orientation.

As we saw with the previously discussed cases, this discrimination complaint has nothing to do with ensuring access to services. GLSO could get its shirts printed, but still decided to persecute Hands On Originals for disagreeing with its message. Indeed, soon after filing its nondiscrimination complaint, GLSO filled its shirt order with little trouble when another company offered *to print the shirts for free*. Nevertheless GLSO continues—to this day—to press its claim against Blaine and his company by not dismissing its complaint.

To add injury to insult, upon filing its discrimination complaint, GLSO and its allies began a public campaign against Hands On Originals in the community, which included, among other things, a page on the group’s website and a “Boycott Hands On Originals” Facebook page. As a result of the public pressure created by GLSO, some of Hands On Originals’ large customers—such as the University of Kentucky, the Fayette County Public School System, and the Kentucky Blood Center—have publicly stated that they are placing a hold on further business with Blaine and his company, resulting in a significant loss of business for Hands On Originals. This unfortunate and unwarranted development has jeopardized the livelihood of Blaine’s many employees and the future of his company.

In November 2012, the Commission found probable cause to believe that Hands On Originals violated the local nondiscrimination ordinance. By simply striving to conduct himself consistently with his faith, Blaine now faces a legal struggle that threatens to approximate in time and pain the one already endured by the Huguenins in New Mexico. The travails of Hands On Originals illustrates that living in accordance with one’s religious belief is an increasingly expensive right to exercise in these times.

The Ocean Grove Camp Meeting Association

The Ocean Grove Camp Meeting Association was founded in 1869 by a small band of Methodist clergymen on the New Jersey shore. It is a religious association that provides a venue for religious services, including Sunday services, Bible studies, camp meetings, revival gatherings, gospel music programs, religious educational seminars, and other religious events. Upon its incorporation, the Association pledged that it would use its facilities for God’s glory and would abstain from using them in any way “inconsistent with the doctrines, discipline, or usages of the Methodist Episcopal Church.”

As part of its outreach programs to the community, the Association makes regular use of its privately owned, open-air Boardwalk Pavilion overlooking the Atlantic Ocean. Each day throughout the summer, the Association hosts overtly and exclusively religious events in the Boardwalk Pavilion, events ranging from Bible studies to worship services and revival meetings. All events held in the Boardwalk Pavilion are consistent with the religious beliefs and doctrines of the Association.

In 1997, the Association began operating a wedding ministry in many of its private places of worship, including the Boardwalk Pavilion. Because this ministry was a means of Christian outreach to the community, the Association permitted members of the public to have their weddings in the Boardwalk Pavilion.

In March 2007, Harriet Bernstein asked the Association if she could use the Pavilion for a civil-union ceremony with her same-sex partner, Luisa Paster. The Association sincerely believes, based on its interpretation of the Holy Bible and its reading of the Methodist Book of Discipline, that marriage is the uniting of one man and one woman. The Association also believes that homosexual behavior is incompatible with Christian teaching, and thus it does not condone that practice. Naturally, then, the Association denied the couple's request because the proposed use of the facility violated the Association's sincerely held religious beliefs.

In June 2007, the couple filed a discrimination complaint with the New Jersey Division on Civil Rights, alleging that the Association's denial of their request amounted to unlawful discrimination under the New Jersey Law Against Discrimination. As is all too common, the Division agreed, concluding in October 2012 that the Association had violated the State's nondiscrimination law, despite the fact that the Pavilion was a place of religious worship used by a religious organization.

The complaining couple neither suffered nor sought any monetary damages. Nor were they left without a suitable venue for their event, as evidenced by the fact that they held their civil-union ceremony on September 30, 2007, on a fishing pier in Ocean Grove. This case, then, like the others discussed, was not about a lack of access to services or facilities.

Instead, the couple filed their complaint to compel a religious organization to act in a manner that would violate core tenets of its religious faith. Regrettably, the government permitted the couple to use the nondiscrimination laws to prevent the Association from operating its programs and activities consonant with its religious faith.

Phyllis Young

Phyllis Young and her husband own a house in Hawaii, a home in which they have lived for some 35 years, and in which they have raised their children. Now in retirement, Phyllis rents three rooms in her home to pay the mortgage.

In November 2007, Diane Cervelli contacted Phyllis and inquired about staying in her home during an upcoming trip to Oahu. Phyllis asked who would be sharing the one-bed room. Ms. Cervelli stated that she would be staying with her same-sex partner. Phyllis declined the

request because she believes that she would be disobeying God if she allowed a same-sex couple to share a room and a bed in her own home. Were Phyllis to do that, she would consider herself to be facilitating immoral behavior within her residence.

Subsequently, Ms. Cervelli and her partner filed a lawsuit against Phyllis. At oral argument just a few weeks ago, the trial judge ruled against Phyllis, concluding that Phyllis and her husband's home for the last 35 years is a public accommodation under Hawai'i law and thus equivalent to a restaurant, bus station, laundromat, and other establishments into which the public can freely enter. The judge thus held that the nondiscrimination law requires Phyllis to permit Ms. Cervelli and her partner to share a bed in her home.

This ill-considered ruling, if permitted to stand, will prevent Phyllis and others from choosing the people they rent rooms to in their own homes. If Phyllis does not have this freedom, she will be forced to stop renting her property. This will likely prevent Phyllis and her husband from meeting their monthly mortgage obligations, thus forcing them to give up the home in which they raised their children.

Julea Ward

Julea Ward was enrolled as a student in a graduate counseling program at Eastern Michigan University ("EMU"). As part of a practicum course, Julea was assigned a potential client seeking assistance for a same-sex relationship. Julea knew that she could not affirm the client's relationship without violating her religious beliefs about extramarital sexual relationships, so she asked her supervisor how to handle the matter. Consistent with ethical and professional standards regarding counselor referrals, Julea's supervisor advised her to refer the potential client to a different counselor. Julea followed that advice. The client was not in the least negatively impacted, and indeed never knew of the referral.

Shortly thereafter EMU informed Julea that her referral of the potential client violated the American Psychological Association's nondiscrimination policy, which mirrors many nondiscrimination laws enacted across the country. EMU also told Julea that the only way she could stay in the counseling program would be if she agreed to undergo a "remediation" program, the purpose of which was to help her "see the error of her ways" and change her "belief system" as it related to providing counseling for same-sex relationships. Julea was unwilling to violate or change her religious beliefs as a condition of getting her degree, and therefore she refused "remediation."

At a subsequent disciplinary hearing, EMU faculty denigrated Julea's Christian views and asked several uncomfortably intrusive questions about her religious beliefs. Among other things, one EMU faculty member asked Julea whether she viewed her "brand" of Christianity as superior to that of other Christians, and another engaged Julea in a "theological bout" designed to show her the error of her religious thinking. Following this hearing, in March 2009, EMU formally expelled Julea from the program, basing its decision on the APA's nondiscrimination policy. At that time, Julea had been enrolled in the counseling program for three years and was only 13 quarter hours away from graduation.

Julea filed suit against EMU officials. After the trial court dismissed her claims, Julea won a unanimous victory from the Sixth Circuit Court of Appeals. When ruling in Julea’s favor, that court noted that “[t]olerance is a two-way street,” for if it were otherwise, nondiscrimination measures would “mandate[] orthodoxy, not anti-discrimination.”¹

The abuse of religious liberty in the name of “tolerance” that the Sixth Circuit diagnosed is the same abuse our clients regularly suffer, all over this country, and it is visited upon them by the very nondiscrimination laws that, ironically enough, purport to protect the religious from discrimination.

* * * * *

As the foregoing examples demonstrate, and as the subsequent legal analysis will further show, nondiscrimination laws have morphed from their noble and laudable origins of ensuring access to essential goods and services into intrusively expansive measures of political imposition that stifle the religious liberty and other constitutional rights of business owners, professionals, religious entities and associations, educational institutions, membership organizations, students and teachers, community groups, employers, employees and countless ordinary Americans. Because recently codified protected classifications such as “sexual orientation” and “gender identity” implicate significant moral issues for people of faith, nondiscrimination laws are among the most significant threats to religious adherents’ rights to freely exercise their faith. Regrettably, as many of the previously discussed cases illustrate, courts have been all too unwilling to protect the faithful, and all too eager to placate those who have acquired a newly protected status. Therefore, robust conscience exemptions to nondiscrimination laws are necessary, lest religious adherents in the public square become endangered species in a nation whose first freedom is religious liberty.

I. Supreme Court precedent shows that many applications of nondiscrimination laws violate the First Amendment.

The United States Supreme Court has repeatedly recognized that nondiscrimination laws are applied in ways that infringe on cherished First Amendment freedoms, such as freedom of speech and association. In one case, for example, the Massachusetts Supreme Judicial Court ruled that the organizers of the St. Patrick’s Day Parade in Boston violated the statutory prohibition against sexual-orientation discrimination when they refused to allow a homosexual-advocacy group to interject its message into a parade that was considered a public accommodation under state law.² On appeal, the United States Supreme Court overruled that decision, declaring that the state court’s application of the nondiscrimination law to this public accommodation violated the constitutional free-speech rights of the parade organizers by compelling them to communicate a message they did not want to express.³

In another case, the New Jersey Supreme Court ruled that the Boy Scouts of America violated the State’s sexual-orientation-nondiscrimination law when it denied, consistent with its

¹ *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012).

² *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v. City of Bos.*, 636 N.E.2d 1293 (Mass. 1994).

³ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995).

moral values, a scout-leader position to an outspoken homosexual.⁴ Yet the United States Supreme Court disagreed, ruling that New Jersey’s application of its nondiscrimination law infringed on the constitutional free-association rights of the Boy Scouts to join together with those individuals who believe in, and seek to promote, the organization’s core values.⁵ These cases tangibly demonstrate the constitutional concerns that are created by unnecessarily expansive nondiscrimination laws.

The United States Supreme Court is not alone in acknowledging the constitutional violations that result from modern nondiscrimination laws. Many legal scholars have noted that the expansion of nondiscrimination laws has emerged as a “serious threat” to constitutional rights and our nation’s timeless civil liberties.⁶ What is more, the danger of these laws is not simply the denial of constitutional freedoms promised to all; the threat includes the chilling effect that these laws inflict on citizens who are unaware or unsure of the extent of their constitutional rights, or unwilling to endure the hardships and costs associated with vindicating those constitutional rights in courts. As one legal analyst has acknowledged: “[T]he fear of litigation [under these nondiscrimination laws]—fear not only of actually losing a lawsuit, but also fear of being vindicated only after a protracted, expensive legal battle—is having a profound chilling effect on the exercise of [constitutional] liberties in workplaces, universities, membership organizations, and churches throughout the United States.”⁷

II. Nondiscrimination laws have had a widespread and pernicious impact on religious liberty.

The direct conflict between many nondiscrimination laws and religious liberty is readily apparent.⁸ On the one hand, Christianity, Judaism, Mormonism, and Islam—the major religions in our nation—hold certain precepts and convictions about sexual behavior, including beliefs about homosexual conduct.⁹ But on the other hand, many nondiscrimination laws prohibit individuals and entities that hold these beliefs from acting upon their moral convictions. The course has thus been set for repeated collisions between these two competing concepts.

⁴ *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999).

⁵ *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

⁶ David E. Bernstein, *You Can’t Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws* 8 (Cato Inst. 2003); *see also* Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 Hofstra L. Rev. 1155, 1200 (2005) (“[T]he broadening of antidiscrimination law . . . creates substantial . . . costs to private actors’ freedom from government restraint”).

⁷ Bernstein, *supra*, at 8.

⁸ Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 43-44 (2000) (noting that legal issues involving sexual orientation “feature a seemingly irreconcilable clash between those who believe that homosexual conduct is immoral and those who believe that it is a natural and morally unobjectionable manifestation of human sexuality”).

⁹ Joseph Card. Ratzinger & Angelo Amato, *Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons*, Congregation for the Doctrine of the Faith (June 3, 2003), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html (“Sacred Scripture condemns homosexual acts as a serious depravity . . . (cf. *Rom* 1:24-27; *I Cor* 6:10; *I Tim* 1:10). This judgment of Scripture . . . does attest to the fact that homosexual acts are intrinsically disordered.”) (internal quotation marks omitted); The Book of Discipline of the United Methodist Church ¶161(G) (2004) (“The United Methodist Church does not condone the practice of homosexuality and consider[s] this practice incompatible with Christian teaching.”).

A. Religious liberty and freedom of conscience are paramount in our nation’s history and the legal regime designed by our Founders.

Our nation’s legal traditions—including the Constitution itself—clearly affirm the importance and preeminence of religious liberty.¹⁰ James Madison, the drafter of the Bill of Rights, recognized that the duty to follow the dictates of one’s conscience concerning religion is “precedent, both in order of time and in degree of obligation, to the claims of Civil Society” and civil law.¹¹ Madison thus stated that “Religion . . . must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.”¹² Put differently by Joseph Story, one of our nation’s earliest and most prominent Supreme Court justices: “The rights of conscience are . . . beyond the just reach of any human power. They . . . [must] not be encroached upon by human authority” such as that embodied in the civil law.¹³

Because they realized the value and significance of religious liberty, our nation’s Founders included robust protection for the free exercise of religion in the First Amendment enshrined in the Bill of Rights.¹⁴ By doing so, they confirmed that religious liberty was a “fundamental maxim[] of free Government,” which should (and eventually would) “become incorporated with the national sentiment.”¹⁵ And by selecting the phrase “free exercise” of religion for inclusion in the Constitution, instead of a mere freedom to worship or believe, the Founders showed that religious freedom includes not only religious adherents’ right to hold their beliefs or opinions; it also guards their religiously motivated conduct against government punishment or coercion.¹⁶

¹⁰ See Douglas Laycock, *Religious Liberty As Liberty*, 7 J. Contemp. Legal Issues 313, 314, 322, 337, 347 (1996) (“Secular intellectuals skeptical of religious liberty may argue that other strong personal commitments should have been protected as well. But they were not, for the sufficient reason that other strong personal commitments had not produced the same history. The protected liberty is religious liberty, and although the word ‘religion’ must be construed in light of continuing developments in beliefs about religion, we cannot rewrite the Constitution to say that religious liberty should not receive special protection . . .”).

¹¹ James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* The Sacred Rights of Conscience 309, 309 (Dreisback & Hall eds., 2009).

¹² *Id.*; see also Va. Const. art. 1, § 16 (“[R]eligion. . . can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience[.]”).

¹³ Joseph Story, Commentaries on the Constitution of the United States § 1870 (1833).

¹⁴ U.S. Const. amend. I.

¹⁵ Letter from James Madison to Thomas Jefferson (Oct 17, 1788), *reprinted in* The Sacred Rights of Conscience, *supra*, at 413, 414.

¹⁶ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1488-90 (May 1990). “As defined by dictionaries at the time of the framing, the word ‘exercise’ strongly connoted action.” *Id.* at 1489; see also Laycock, *Religious Liberty As Liberty*, *supra*, at 337, 347 (“The Free Exercise Clause guarantees a substantive right to exercise one’s religion. ‘Exercise’ means activity or practice, both now and in the Founders’ time; it is not confined to belief or to speech. The right is not stated as a mere right to nondiscrimination. It is common ground that religious conduct is the exercise of religion; otherwise, the Free Exercise Clause would not protect such conduct even from discrimination. But once that is conceded, a law prohibiting religious conduct is quite literally a law ‘prohibiting the free exercise thereof’—a law prohibiting the exercise of religion. . . . Laws that restrict religiously motivated conduct or interfere with the autonomy of religious organizations *prima facie* violate the Free Exercise Clause.”).

This is essential because, as constitutional scholar Alan Brownstein has argued, “religion is one of the most self-defining and transformative decisions of human existence . . . [and] . . . [a]lmost any other individual decision pales in comparison to the serious commitment to religious faith.”¹⁷ Government officials should therefore refrain from burdening their constituents’ religious exercise, an inviolable and intensely personal right, through the passage and application of nondiscrimination laws.

As a matter of political theory, government officials lack legitimate authority to enact laws intruding upon this inalienable right. Indeed, James Madison declared that politicians “who are guilty” of encroaching upon religious liberty “exceed the commission from which they derive their authority.”¹⁸

Public officials, moreover, should respect religious liberty for pragmatic reasons as well. As George Washington stated, the “[p]olitician, equally with the pious man[,] ought to respect and cherish” religion (and the free exercise thereof) because it is an “indispensable support[]” that “lead[s] to political prosperity.”¹⁹

Society, therefore, should be wary of any measures, nondiscrimination laws being a prime example, that by design or application threaten principles of religious liberty.

B. Nondiscrimination laws are a demonstrated threat to religious liberty.

Nondiscrimination laws threaten to inflict widespread and pervasive harm on religious liberty, affecting—among others—business owners, professionals, religious entities, educational institutions, membership organizations, community groups, employers, and employees. This threat to religious freedom is no mere speculation. To the contrary, the subversion of religion has been amply demonstrated throughout recent history.

¹⁷ Alan E. Brownstein, *The Right Not to Be John Garvey*, 83 Cornell L. Rev. 767, 807 (1998); see also John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. Contemp. Legal Issues 275, 275, 278, 286-87 (1996) (“[W]e protect freedom of religion as a constitutional right . . . because religion is important. . . . The bill of rights protects the free exercise of religion. It says nothing about free love, free trade, or excise taxes on tobacco. . . . Of course the government often causes great harm to unbelievers as well. A religious pacifist fears for his salvation when he is drafted, but the average Marine also suffers at the thought of leaving his family and going into combat. From a religious point of view, though, the cases are not comparable. The harm threatening the believer is more serious (loss of heavenly comforts, not domestic ones) and more lasting (eternal, not temporary). That is what justifies restricting this special kind of freedom to religious claimants alone.”); Laycock, *Religious Liberty As Liberty*, *supra*, at 317 (“[B]eliefs about religion are often of extraordinary importance to the individual—important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for. This is why governmental efforts to impose religious uniformity had been such bloody failures.”).

¹⁸ Madison, *supra*, at 309.

¹⁹ George Washington’s Farewell Address (Sept. 19, 1796), *reprinted in* The Sacred Rights of Conscience, *supra*, at 468, 468.

1. Religious liberty for business owners, service providers, and helping professionals

Nondiscrimination laws infringe the religious freedom of many business owners,²⁰ including companies that engage in expression or are involved with event services. These businesses include—to name but a few—publishers, printers, marketers, publicists, newspapers, photographers, musicians, authors, event-venue rentals, bed-and-breakfast establishments, banquet halls, florists, and bakeries. If these business owners, compelled by their religious beliefs, decline to express a message (or decline to contribute their services or property to an event that expresses a message) that violates their convictions, they face lawsuits under prevailing nondiscrimination laws—to wit:

- As discussed above, a New Mexico state appellate court found that Jonathan and Elaine Huguenin of Elane Photography engaged in sexual-orientation discrimination when they refused for religious reasons to photograph a same-sex couple’s commitment ceremony, and the court upheld an order requiring the company to pay nearly \$7,000 to the same-sex couple.²¹
- As discussed above, the ACLU and the Vermont Human Rights Commission challenged Jim and Mary O’Reillys’ practice of disclosing their religious beliefs about marriage to people who asked their bed-and-breakfast to host an event celebrating a same-sex union. To save their business, the O’Reillys agreed to pay \$30,000.²²
- An Illinois same-sex couple filed discrimination complaints against two family-owned bed-and-breakfasts when the owners of those establishments, for religious reasons, declined to host the couple’s civil-union ceremony.²³

²⁰ People of faith who operate for-profit businesses are religious actors entitled to legal protection. *See generally* Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-Makers?*, 21 *Geo. Mason L. Rev.* (forthcoming fall 2013), available at Social Science Research Network http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2244611_code290226.pdf?abstractid=2229632&mirid=1 (last visited April 18, 2013) (“Denying religious liberty rights in the profit-making context requires treating religion as a special and disfavored activity at every turn. Businesses would have to be deemed able to act on subjective motivations about ethics, the environment and other non-financial beliefs, but unable to act on beliefs about religion. . . . There is no principled or permissible reason to treat religious exercise in this specially disfavored manner. Doing so turns religious liberty law on its head, singling out religious exercise for special burdens rather than special protections. The government has no such power to discriminate against acts on the basis of the religious motivation behind those acts.”); Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 *Nw. J. L. & Soc. Pol’y* 206, 217-18 (2010) (“[Religious adherents] cannot live out the all-encompassing commitment of belief simply in private worship. . . . Nor can committed religious believers easily leave their faith behind when they enter the economic marketplace. As Eugene Volokh has argued, ‘people spend more of their waking hours [in the workplace] than anywhere else except (possibly) their homes’; to block religious moral precepts and influences from operating in this arena ‘ignores the reality of people’s social and political lives.’ I have discussed elsewhere how government must be careful not to act on the premise, explicit or implicit, that ‘religion should not be part of business affairs.’”); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) (finding that a family-owned for-profit corporation “has standing to assert the free exercise rights of its owners”).

²¹ *Elane Photography, LLC v. Willock*, 284 P.3d 428, 433, 445 (N.M. Ct. App. 2012).

²² Ros Krasny, *Lesbian brides win settlement from Vermont inn*, Reuters.com (Aug. 24, 2012, 9:33AM EDT), <http://www.reuters.com/article/2012/08/24/uk-usa-lesbians-vermont-idUSLNE87N00I20120824>.

²³ Terry Hillig, *Men say Alton inn won’t host their civil union ceremony*, Stltoday.com (Feb. 23, 2011, 12:15 PM), http://www.stltoday.com/news/local/metro/article_14f7eef0-3f7a-11e0-bb53-0017a4a78c22.html.

In addition to affecting businesses engaged in expression or event services, nondiscrimination laws also stifle the religious liberty of business owners whose work implicates family structures or romantic relationships. Some examples of these include:

- Landlords and bed-and-breakfast owners who believe that they would violate their religious beliefs if they allow unmarried couples to cohabit on their property²⁴
- Private adoption-placement agencies whose owners' religious beliefs dictate their business practice of placing children only in homes with both a mother and a father²⁵
- Dating or couples-matching services whose owners' religious worldview instructs them only to facilitate opposite-sex relationships²⁶
- Any business owner that, for religious reasons, offers a "family" membership only to married couples²⁷

Nondiscrimination laws, moreover, threaten the religious liberty of individuals in the helping professions, including doctors, lawyers, counselors, psychologists, and social workers. Consider the following examples:

- A state court found that physicians whose religious beliefs forbid them from providing an elective fertility procedure for an unmarried woman in a same-sex relationship violated the State's nondiscrimination law.²⁸
- Government officials have declared that licensed counselors and counseling students engage in sexual-orientation discrimination when their religious convictions prohibit them from providing counseling that affirms same-sex relationships.²⁹

²⁴ See *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (analyzing a marital-status-discrimination claim against a landlord who refused to rent to unmarried couples because of a religious conviction against allowing unmarried cohabitation in the property); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (same); *McCready v. Hoffius*, Case Nos. 94-69473-CH, 94-69472-CH, Opinion and Order (Mich. Cir. Ct. Dec. 6, 2000) (same).

²⁵ *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1056-57 (N.D. Cal. 2007) (refusing to dismiss a sexual-orientation-discrimination claim against the largest online adoption website in the United States because the website's owners had a religiously based policy against placing children with unmarried couples); see also Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* 77, 78-79 (Laycock et al. eds., 2008) ("In 2004, Adoption.com, the largest Internet adoption site in the United States, refused to post the profile of a same-sex couple seeking to adopt. . . . The couple sued, claiming the refusal violated California's nondiscrimination law The parties subsequently settled the private litigation between them. That settlement required in part that Adoption.com and its sister organizations[] would not post profiles of California residents Put to the choice to make its services available to all or none, Adoption.com chose to leave the California market."); Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 *BYU J. Pub. L.* 475 (2008) (describing in detail the Adoption.com case and other clashes between religious liberty and same-sex adoption).

²⁶ Jill Serjeant, *eHarmony sued in California for excluding gays*, Reuters (May 31, 2007 7:10 PM EDT), <http://www.reuters.com/article/idUSN3122132120070531?feedType=RSS&rpc=22> (describing a "lawsuit alleging discrimination based on sexual orientation" that was filed against the online dating website, eHarmony—a company founded and owned by an evangelical Christian—because it provided couples-matching services only to "men seeking women" and "women seeking men").

²⁷ *Professor's complaint sparks change in YMCA policy definition of family*, Drake University News (Aug. 7, 2007), <http://192.84.11.21/news/archive/index.php?article=1941> (mentioning the Des Moines Human Rights Commission's decision declaring that an athletic club with a religiously based founding engaged in sexual-orientation discrimination by not extending its "family" membership to include cohabiting same-sex couples).

²⁸ *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct.*, 189 P.3d 959 (Cal. 2008).

These business owners and professionals—most of whom operate their businesses or carry out their professions as an extension of their moral or religious beliefs³⁰—are faced with an unjust choice: either violate their religious precepts and retain their livelihood, or adhere to their convictions and forfeit their right to participate in the marketplace. Given the importance and centrality of religious faith to these individuals, many of them are unwilling to violate their conscience, and thus will choose the latter option. But presenting people of faith with a choice between their convictions and their profession runs directly counter to the First Amendment, which was adopted to prevent historical violations of religious freedom that mirror those occurring today with increasing frequency.³¹

2. Religious liberty for religious organizations and community groups

The religious liberty threats posed by nondiscrimination laws are not confined to businesses and professionals, but extend as well to religious and community organizations that maintain principles about sexual conduct and morality. Such entities include organizations providing charitable or public-assistance services. Here are some examples:

- These laws have forced charitable adoption organizations to close because they could not adhere to their religious convictions against intentionally depriving children of a mother or a father by placing them with a same-sex couple.³²

²⁹ *Ward v. Polite*, 667 F.3d 727, 732 (6th Cir. 2012) (ruling against a public university that dismissed a counseling student because, according to the university, her religious need to refer prospective clients who sought counseling affirming their same-sex relationships amounted to discrimination based on sexual orientation); Marc D. Stern, *Same-Sex Marriage and the Churches*, in *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* 1, 24 (Laycock et al. eds., 2008) (“How will providers . . . deal with same-sex couples who come for marriage counseling? . . . Would a refusal [to provide such counseling] violate public accommodation [nondiscrimination] laws? Probably.”).

³⁰ Berg, *supra*, at 227 (“Small businesses that provide personal services tend to be direct embodiments of the owner’s identity. The small landlord may feel direct responsibility for providing the space for intimate conduct to which she objects; the wedding photographer may feel direct responsibility for using her artistic skills to present in a positive light a marriage to which she objects.”).

³¹ See Douglas Laycock, *Afterword to Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, *supra*, at 189, 201 (“The English Test Acts and penal laws long excluded Catholics from a range of occupations, including . . . solicitors, barristers, notaries, school teachers, and most businesses with more th[a]n two apprentices. These occupational exclusions are one of the core historic violations of religious liberty, and of course this history was familiar to the American Founders. In light of this history, it is simply untenable to say . . . that exclusion from an occupation is not a cognizable burden on religious liberty.”).

³² Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston was Victim to the Clash between Gay Rights and Religious Freedom*, 15 *Duke J. Gender L. & Pol’y* 297, 299 (2008) (“Massachusetts law prohibits discrimination based on sexual orientation . . . Pursuant to this, Massachusetts Department of Social Services regulations forbid discrimination based on sexual orientation as a condition of licensing. Catholic Charities faced a Hobson’s choice: either comply with [the] law and place children with gay couples or lose their license and end their ministry to needy children. Stated another way, either violate their clear Church doctrine, or ignore their religious vocation. Either way they must sacrifice a religious commitment.”); Patricia Wen, *They Cared for the Children: Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families*, *Boston Globe*, June 25, 2006, at A1 (explaining how Massachusetts threatened to revoke the adoption license of Catholic Charities for refusing on religious grounds to place foster children with same-sex couples); Jonathan Petre, *Church pulls out of Catholic agencies over ‘gay equality’ adoption law*, *Daily Mail Online* (May 24, 2008, 11:03 PM), <http://www.dailymail.co.uk/news/article-1021721/church-pulls-catholic-agencies-gay-equality-adoption-law.html> (recounting how the Catholic Church severed its connection—and

- These laws can be used to prohibit religiously affiliated homeless shelters or other charitable housing facilities from, in accordance with their religious tenets, forbidding same-sex or unmarried couples from sharing a room or bed.
- These laws have compelled religiously affiliated hospitals to provide elective gender-mutilating surgeries even though such procedures conflict with the organization's religious precepts.³³

Nondiscrimination laws affect not only charitable organizations, but also religious educational institutions. Those institutions have been affected in the following ways:

- A New York court found that a private, religiously affiliated university—due to the enactment of a sexual-orientation-nondiscrimination law—may no longer be allowed to prohibit, as required by its religious tenets, unmarried couples from living together in university housing.³⁴
- Students in California alleged that a private, religiously affiliated high school violated the State's nondiscrimination law when it expelled them for their involvement in an extramarital sexual relationship.³⁵
- A District of Columbia court ruled that a sexual-orientation-nondiscrimination law requires a private, religiously affiliated university to give tangible benefits to a student organization that engaged in advocacy against the religious tenets of the university.³⁶

Furthermore, nondiscrimination laws threaten religious organizations that, as a means of ministering to and interacting with the community, have opened their premises to the public. Ironically, the more a religious organization seeks to serve the broader community, the more it exposes itself to the pernicious effects of these laws. A quintessential example of this is illustrated by the Ocean Grove Camp Meeting Association case discussed in the introduction

thus its funding—from three of its top adoption agencies, and noting the Church's statement that "its agencies cannot remain both Catholic and conform with the Sexual Orientation Regulations").

³³ *Catholic hospital to allow transgender surgery after being sued*, Catholic News Agency (Mar. 4, 2008, 4:19 AM), http://www.catholicnewsagency.com/news/catholic_hospital_to_allow_transgender_surgery_after_being_sued/ (recounting that a man sued a Catholic hospital in California under the State's nondiscrimination law for refusing to perform a breast-implant surgery on him after his sex-change operation, and stating that the hospital later agreed to perform the surgery even though "Catholic teaching prohibits the accommodation of sex-change operations").

³⁴ *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001) (finding that a same-sex couple's complaint against a private university's policy that prevented the couple from living together in university housing stated a sufficient claim of sexual-orientation discrimination).

³⁵ *Doe v. Californian Lutheran High School Ass'n*, 88 Cal. Rptr. 3d 475 (Cal. Ct. App. 2009) (rejecting the students' claims because the school was not included within the reach of the nondiscrimination law, but expressing no opinion about whether the expulsion constituted sexual-orientation discrimination); see also *Across the USA News from every state*, USA Today, Jan. 14, 2011, at A8, available at http://usatoday30.usatoday.com/printedition/news/20110114/states14_st.art.htm ("The Roman Catholic Boston Archdiocese, which came under fire last year when a priest said a lesbian couple's child could not attend a parish school, has issued a new admissions policy that does not 'discriminate against or exclude any categories of students.'").

³⁶ *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 21-30 (D.C. 1987) (finding that the university must give "tangible benefits" to the homosexual-advocacy group, but holding that the university need not give the group its official "endorsement").

above.³⁷ Yet community-minded organizations should be subject to intrusive nondiscrimination laws simply because they serve the community and perform acts of kindness.³⁸

3. Religious liberty in the workplace

Nondiscrimination laws, because of the obligations they impose, also infringe the religious liberty of employers and their employees. Some employers have legitimate reasons for considering an employee's or applicant's sexual behavior when making certain employment decisions. These situations include, for example, a religious or morally grounded school, group, or organization when it is hiring for teaching, leadership, or other role-model positions (e.g., principal, teacher, or leader). But nondiscrimination laws, as currently constituted, often forbid these entities from adhering to their moral and religious convictions by forcing them to hire, or prohibiting them from removing, a person whose conduct conflicts with these groups' beliefs about human sexuality.³⁹

Additionally, nondiscrimination laws often force religiously motivated employers to extend the same employment benefits to their employees' same-sex partner that they give to married spouses of the opposite sex.⁴⁰ Yet these employers might reasonably believe that affording benefits based on a same-sex relationship encourages or supports their employees' decisions to engage in such relationships, and that, by supporting relationships they believe to be immoral, they are violating their religious beliefs. Despite the clear and pressing religious conflict, the mandates embodied in nondiscrimination laws sweep aside any conscience objection as illegitimate. But all Americans, including job creators and providers, should be free to live according to their faith.

The religious-liberty infringements inflicted by nondiscrimination laws are not limited to employers; they also extend to employees. Nondiscrimination laws, after all, require employers to prevent their employees or customers from engaging in conduct that other employees might view as unlawful discrimination,⁴¹ prompting most employers to adopt policies prohibiting the

³⁷ *Bernstein v. Ocean Grove Camp Meeting Ass'n*, DCR Docket No. PN34XB-03008, Findings, Determination, and Order, New Jersey Division on Civil Rights at 15 (Oct. 22, 2012).

³⁸ In addition, the religious liberty of another category of groups—membership organizations—is also negatively affected by nondiscrimination laws. As previously mentioned, these laws have already been used by state courts to force organizations, despite their moral convictions about human sexuality, to accept leaders who openly contravene the group's moral values. See *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999), *rev'd*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

³⁹ Jonathan Petre, *School cannot sack head in "gay marriage,"* The Telegraph (Aug. 13, 2007, 12:01 AM), <http://www.telegraph.co.uk/news/uknews/1560153/School-cannot-sack-head-in-gay-marriage.html> (recounting a Catholic primary school's legal determination, after enactment of a sexual-orientation-nondiscrimination law, that it could not remove a headmaster who was openly involved in a same-sex relationship—conduct that was contrary to the religious teachings of the school).

⁴⁰ *Martinez v. Cnty. of Monroe*, 50 A.D.3d 189, 193 (N.Y. App. Div. 2008) (finding that an employer "violated Executive Law § 296(1)(a), which forbids an employer from discriminating against an employee . . . because of [her] sexual orientation," by refusing to recognize the employee's same-sex relationship or provide benefits to her same-sex partner).

⁴¹ Stern, *Same-Sex Marriage and the Churches*, *supra*, at 50 ("[E]mployers have a two-sided obligation with regard to harassment. The employer may not itself engage in harassment and it may not allow employees or customers to create an intolerable environment for an employee based on one of the prohibited bases of discrimination.").

categories of discrimination codified in the governing nondiscrimination laws.⁴² These policies, regardless of whether employers intend them to, significantly affect religious liberty in the workplace.

Sexual-orientation-nondiscrimination policies, for instance, affect religiously motivated employees whose work—like counselors, doctors, lawyers, or psychologists—requires them to interact with issues that implicate family structures, romantic relationships, or sexual conduct. These policies force employees either to engage in conduct that affirms same-sex relationships or to face punishment for refusing to violate their religious tenets. The real-life story of what happened to a licensed counselor in Georgia demonstrates this far-reaching threat to religious liberty.

Like many people of faith, the Georgia counselor holds religious beliefs about human sexuality, and those beliefs instruct her how to use her skills as a counselor.⁴³ At work one day, due to her religious convictions, she politely referred a prospective client seeking same-sex-relationship counseling to a colleague, who within minutes provided the referred client with the counseling she sought.⁴⁴ The client testified that the counseling she received as a result of the referral was “exemplary.”

But then, that same day, after admittedly receiving “exemplary” counseling, the client complained to the counselor’s employer, citing a sexual-orientation-nondiscrimination policy, arguing that she should have never been referred, and threatening to file a complaint.⁴⁵ Although the counselor’s actions complied with her profession’s ethical obligations and the client received “exemplary” counseling, the employer took swift action against the counselor, suspending her within days and terminating her soon thereafter.⁴⁶

Similar blunting of religious liberty undoubtedly occurs with employees whose jobs—like newspaper reporters or photographers—require them to create expression. Religiously motivated employees who are unable to create job-related expression conveying messages about human sexuality that they deem objectionable are likely to face punishment or suspension under their employer’s nondiscrimination policy, even though federal law requiring employers to accommodate the religious conflicts of their employees forbids such unnecessary sanctions.⁴⁷

⁴² *Id.* at 51 (“[M]ost employers, wary of the expense of defending a harassment lawsuit, are likely to enact their own rules”).

⁴³ *Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277, 1280 (11th Cir. 2012).

⁴⁴ *Walden*, 669 F.3d at 1280-81.

⁴⁵ *Walden*, 669 F.3d at 1281; *Walden v. Centers for Disease Control and Prevention*, Case No. 1:08-CV-2278-JEC-WEJ, Magistrate Judge’s Final Report and Recommendation, Doc. No. 111, at 40-41 (N.D. Ga. Nov. 20, 2009).

⁴⁶ *Walden*, 669 F.3d at 1280-82.

⁴⁷ Indeed, sexual-orientation-nondiscrimination laws inevitably generate conflicts between their prohibition of sexual-orientation discrimination and an employer’s obligation under federal law to provide a reasonable accommodation for its employees’ religious needs and practices. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977); 42 U.S.C. § 2000e-2(a); 42 U.S.C. § 2000e(j). Consider the example of the Georgia counselor discussed above. On the one hand, the employer has a policy prohibiting sexual-orientation discrimination, which weighs against allowing the counselor to refer clients seeking same-sex-relationship counseling. But on the other hand, the employer has an obligation under federal law to “make reasonable accommodations, short of undue hardship, for the religious practices of [its] employees and prospective employees.” *Trans World Airlines, Inc.*, 432

The threat to religious liberty in the workplace extends even beyond punishing employees for refusing to engage in conduct forbidden by their religious conviction; it also includes suppressing the expression and ostracizing the views of religious employees.⁴⁸ A few examples illustrate this point.

The City of Oakland, California, for instance, despite generally allowing its employees to advertise their political views and activities on a bulletin board, prohibited religious employees from posting a flier advertising their discussion group—a flier that included the statement that “[m]arriage is the foundation of the natural family and sustains family values”—because, the City claimed, the flier’s statement about marriage promoted harassment based on sexual orientation.⁴⁹

Additionally, experience has shown that many employers try to promote compliance with these laws by implementing “diversity” or “sensitivity” training about sexual orientation,⁵⁰ and these programs, unfortunately, often disparage religious adherents’ views, effectively marginalizing and shunning those employees and their deeply held beliefs.⁵¹ Tragically, the champions of so-called “diversity” typically do not tolerate a diversity of views.

C. Nondiscrimination laws cause public and private discrimination against individuals and organizations that express or adhere to their religious views concerning homosexual behavior.

Nondiscrimination laws, in addition to inflicting the immediate harm to religious liberty discussed above, threaten religious freedom in other ways. Experience has shown, for instance, that sexual-orientation-nondiscrimination laws lead to additional government discrimination against individuals and organizations that hold sincere religious beliefs concerning human sexuality. These laws brand individuals and organizations as “discriminatory” simply for abiding by their religious precepts concerning sexual morality. Here are some examples of government-

U.S. at 74. In the end, an employer’s obligation under federal law to accommodate its employees’ religious conflicts should prevail, but nondiscrimination laws needlessly create a legal conflict that has a natural tendency to discourage the free exercise of religion.

⁴⁸ Stern, *Same-Sex Marriage and the Churches*, at 51 ([M]ost employers . . . are likely to enact their own rules on impermissible speech in the workplace. These are likely to suppress any speech that some other protected class of employee finds hurtful[.]”).

⁴⁹ George F. Will, *Speech Police, Riding High in Oakland*, Washington Post (June 24, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/22/AR2007062201704.html>.

⁵⁰ *Diversity Training on Sexual Orientation and Gender Identity*, Human Rights Campaign, available at <http://www.hrc.org/resources/entry/diversity-training-on-sexual-orientation-and-gender-identity-issues> (last visited April 19, 2013) (noting that “more than half of the Fortune 500 provide some form of diversity training that includes sexual orientation” and “most of all the employers that prohibit discrimination based on gender identity have some form of related diversity training”).

⁵¹ *Altman v. Minn. Dep’t of Corr.*, 251 F.3d 1199, 1201 (8th Cir. 2001) (“[Employees] reviewed the training materials for the gays-and-lesbians-in-the-workplace program and concluded the training would be, in the words of their complaint, ‘state-sponsored indoctrination designed to sanction, condone, promote, and otherwise approve behavior and a style of life [that the employees] believe to be immoral, sinful, perverse, and contrary to the teachings of the Bible.’”); David M. Kaplan, *Can Diversity Training Discriminate? Backlash to Lesbian, Gay, and Bisexual Diversity Initiatives*, 18(1) Employee Responsibilities and Rights Journal 61 (2006) (noting that employers that implement diversity training on the topic of sexual orientation often face “backlash [that] is not without some merit . . . based on sincere religious beliefs”).

sanctioned discrimination, which is ironically made possible by laws that purport to prevent such intolerance:

- Government entities have refused to contract with individuals and organizations that conduct themselves in accordance with their religious or moral beliefs concerning human sexuality.⁵²
- Government entities have withheld benefits from individuals and organizations that refuse to abandon their religiously or morally grounded policies and practices concerning human sexuality.⁵³
- Government entities have prevented religious individuals with moral convictions about human sexuality from becoming foster parents, thereby depriving needy children of well-qualified caregivers.⁵⁴
- Government entities have revoked licenses from organizations that refuse to act contrary to their religious convictions concerning human sexuality; this withholding of licenses has forced these organizations to shut down their operations.⁵⁵
- Government entities have withdrawn tax benefits from organizations that insist on operating consistently with their religious and moral beliefs concerning human sexuality.⁵⁶

⁵² *Cradle of Liberty Council, Inc. v. City of Philadelphia*, Case No. 08-2429, 2008 WL 4399025, at *3 (E.D. Pa. Sept. 25, 2008) (upholding the City of Philadelphia’s decision to terminate a property arrangement that had lasted over 70 years between the City and the Boy Scouts because that organization’s refusal to allow leaders or members who openly engage in homosexual behavior was, in the City’s words, “directly contrary to the principles of equal access and opportunity enshrined in Philadelphia [nondiscrimination] law”).

⁵³ *Evans v. City of Berkeley*, 129 P.3d 394, 398 (Cal. 2006) (upholding the City of Berkeley’s decision to revoke the Sea Scouts’ free use of boat berths at the public marina, a benefit that had been afforded for 60 years, because the “city attorney conclud[ed] that continuation of the free berth subsidy to the Sea Scouts would violate . . . the Berkeley Municipal Code, which prohibit[ed] discrimination based on sexual orientation”); *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (upholding the State of Connecticut’s decision to stop allowing state employees to direct their workplace-charitable contributions to the Boy Scouts, a benefit that the organization received for over 30 years, because the State determined that directing contributions to an organization, like the Boy Scouts, that refused to allow leaders or members who openly engage in homosexual behavior would violate the State’s sexual-orientation nondiscrimination law); see also Stern, *Same-Sex Marriage and the Churches*, at 19-22 (noting that many state regulators condition government licenses on nondiscrimination requirements).

⁵⁴ *Foster Parents defeated by the new Inquisition*, The Telegraph (Feb. 28, 2011, 6:12 PM), <http://www.telegraph.co.uk/comment/telegraph-view/8353180/Foster-parents-defeated-by-the-new-Inquisition.html> (“Eunice and Owen Johns are a God-fearing Christian couple, married almost 40 years, who offered a secure and loving family home to foster children aged between five and 10. But [the courts] denied [them] the opportunity to do so any longer because they are unwilling to promote a homosexual lifestyle to a child.”); *R (Johns) v. Derby City Council*, [2011] EWHC 375 (Admin) (copy of the approved judgment dated February 28, 2011, available at http://www.christianconcern.com/sites/default/files/docs/Johns_Approved_Judgment.doc).

⁵⁵ Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston was Victim to the Clash between Gay Rights and Religious Freedom*, 15 Duke J. Gender L. & Pol’y 297, 299 (Aug. 2008) (“Massachusetts law prohibits discrimination based on sexual orientation . . . Pursuant to this, Massachusetts Department of Social Services regulations forbid discrimination based on sexual orientation as a condition of licensing. Catholic Charities faced a Hobson’s choice: either comply with [the] law and place children with gay couples or lose their license and end their ministry to needy children. Stated another way, either violate their clear Church doctrine, or ignore their religious vocation. Either way they must sacrifice a religious commitment.”); Patricia Wen, *They Cared for the Children: Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families*, Boston Globe, June 25, 2006, at A1 (explaining how Massachusetts threatened to revoke the adoption license of Catholic Charities for refusing on religious grounds to place foster children with same-sex couples).

Furthermore, nondiscrimination laws, perhaps unintentionally, but no less perniciously, also engender public and private discrimination against individuals and organizations that express (or conduct themselves consistently with) their religious precepts about human sexuality. By branding them as “discriminatory,” these laws encourage public and private contempt against those individuals and organizations and the expression of their views and beliefs. Undoubtedly over time, those individuals and organizations will stop communicating their religious beliefs for fear that they might be viewed or treated with scorn by their neighbors and colleagues. This government-induced ostracizing of core religious beliefs and expression is deeply unsettling.

Nondiscrimination laws thus present an ironic twist: while purporting to discourage discrimination, they actually encourage discrimination against the religious community. And most troublesome of all, by enacting these laws, the government will be complicit in—and, indeed, a direct cause of—this religious discrimination.⁵⁷

This is all the more remarkable when the strength of the competing interests are balanced against each other. As one legal scholar has cogently stated in the context of sexual-orientation-nondiscrimination laws:

Denials of service do affect gay couples by causing them disturbance, hurt, and offense. While acknowledging that harm, one must also acknowledge, I think, that the harm to the objector from legal sanctions is greater and more concrete. In most cases, the offended couple can go to the next entry in the phone book or the Google result. The individual or organization held liable for discrimination, by contrast, must either violate the tenets of her (its) faith or else exit the social service, profession, or livelihood in which she (it) has invested time, effort, and money. One simply has not given the religious dissenter’s interest significant weight if one finds that offense or disturbance from messages of disapproval are sufficient to override it.⁵⁸

⁵⁶ Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, New York Times (Sept. 18, 2007), <http://www.nytimes.com/2007/09/18/nyregion/18grove.html> (reporting that the State of New Jersey refused to recertify a portion of the Ocean Grove Camp Meeting Association’s property for the Green Acres real-estate tax exemption, a tax exemption the Association had held for over 15 years, after learning that the Association refused to host same-sex couples’ civil-union ceremonies on that portion of its property); *see also* Patrick McGreevy, *California lawmakers threaten to strip Scouts of tax exemption*, Los Angeles Times (April 11, 2013), <http://articles.latimes.com/2013/apr/11/local/la-me-boy-scouts-20130411> (reporting that certain California lawmakers are seeking to pressure the Boy Scouts into abandoning their morality-based membership policies by threatening to withdraw tax exemptions from the organization).

⁵⁷ In speaking of Plaintiff Vanessa Willock from the Elane Photography case, noted religious liberty and conscience scholar Robert Vischer noted the following with respect to the tendency of nondiscrimination laws to co-opt state power: “We must remember, though, that Vanessa Willock has become a functional stand-in for the state. It is one thing for Willock’s supporters to target the hearts, minds, and wallets of their fellow citizens through advocacy, protests, and boycotts; it is quite another to bring state power down on the heads of those who have aggrieved them. In the short term, the state can vindicate the conviction that gays and lesbians should enjoy the same treatment as heterosexuals in their attempt to secure goods and services in the marketplace. In the long term, though, even if we applaud a particular moral claim imposed by the state on dissenting consciences, each instance paves the way for an increasingly top-down approach to the common good.” Robert K. Vischer, *Conscience and the Common Good*, 49 J. Catholic Legal Stud. 293, 306 (2011).

⁵⁸ *See* Berg, *supra*, at 229.

Viewing the underlying question as one of human dignity, the scales still weigh decidedly in favor of religious protection. Nondiscrimination laws attack the dignity of persons who affirm traditional religious beliefs about sexual conduct, by (1) labeling as “discriminatory” their closely held religious convictions—a core essence of their being, (2) outlawing their attempts to live according to those beliefs, (3) and pushing them, their beliefs, and their actions to the outer fringes of society. This dignitary harm to those citizens and their ability to live as they feel compelled by their God far outweighs the isolated incidents of offense targeted by these laws.

Conclusion

It was primarily people of faith who, precisely because of their convictions, have tirelessly strived to end slavery, faithfully toiled in the civil-rights movement, and stalwartly defended innocent life. It was the religious faithful who moved the State to act for the sake of justice, and not the other way around, as Commissioner Kirsanow made clear in his remarks at the Commission’s briefing.

That is why it is a tragedy to contemplate religious liberty’s demise at the hands of an ephemeral and crabbed conception of civil rights, diversity, tolerance, dignity, or nondiscrimination. It will be a profound tragedy if the recent expansions of nondiscrimination laws continue to extirpate the religious liberty upon which many of the great moral and civil-rights crusades of our country have been founded.

Alliance Defending Freedom appreciates the Commission’s attention to this pressing issue. We strongly encourage the Commission to defend religious freedom from the overbearing application of nondiscrimination laws. To that end, Alliance Defending Freedom offers this language as a robust religious exemption to public-accommodation nondiscrimination laws:

Religious Exemption from Public-Accommodation Nondiscrimination Laws

- (a) The exemptions in this Section further the compelling governmental interest of protecting the free exercise of religion, and they shall be liberally construed to provide the utmost protection for religious freedom.
- (b) No religious organization, organization supervised or controlled by or in connection with a religious organization, individual employed by any such organization while acting in the scope of that employment, or clergy or minister shall be required to provide services, accommodations, facilities, goods, or privileges if such action would cause such organizations or individuals to violate their sincerely held religious beliefs.
- (c) No individual, non-profit organization, or for-profit organization shall be required to provide services, accommodations, facilities, goods, or privileges if such action would cause such individuals, organizations, or owners of such organizations to violate their sincerely held religious beliefs.
- (d) No refusal to provide services, accommodations, facilities, goods, or privileges protected by this Section shall result in a civil or criminal claim or cause of action or any action by the government to penalize or withhold benefits or privileges, including but not limited to tax exemptions or governmental contracts, grants, or licenses, from any organization or individual protected by this Section.